



BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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In the Matter of	)	
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Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-416
Pursuant to 47 U.S.C. § 160(c) Pertaining to	)	
Qwest's xDSL Services	)	
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	)	
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**COMMENTS OF TIME WARNER TELECOM, CBeyond COMMUNICATIONS AND  
XO COMMUNICATIONS**

Time Warner Telecom, Inc. ("TWTC"), Cbeyond Communications LLC ("Cbeyond") and XO Communications ("XO") by their attorneys, hereby submit these comments in response to the petition for forbearance<sup>1</sup> filed by Qwest in the above-referenced proceeding.

**I. INTRODUCTION AND SUMMARY**

In its *Petition*, Qwest asks for forbearance from dominant carrier tariff regulation, rate averaging requirements and the avoided cost discount resale requirement to the extent those regulations apply to its "mass market-xDSL services." *Petition* at 3. Qwest relies almost entirely upon its smaller market share in xDSL as compared to cable modem service to show that these regulations are not necessary to restrain Qwest's market power in the mass market. But

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<sup>1</sup> See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), Inc. Pertaining to Qwest's xDSL Services*, WC Dkt. No. 04-416 (filed Nov 10, 2004) ("*Petition*").

Qwest never defines either the product or geographic markets for “mass market” broadband services with any precision. It states only that mass market services should include the “service[s] of a type that is normally associated with residential and small business end users.” *Petition* at n.12. It does not even attempt to explain why services demanded by residential and small business users belong in the same product market (*i.e.*, that the demand characteristics of these customers are very similar), what specific services are demanded by such customers, or, most importantly, what types of customers are included in the category “small business.”

Nor does Qwest make any attempt to define the relevant geographic market for purposes of the *Petition*. It appears to assume that the relevant geographic market is national, but it offers no basis for concluding that this is reasonable. Moreover, Qwest’s attempt to include small businesses in the mass market makes the definition of the relevant geographic market especially important and difficult because cable networks, the most important source of facilities-based competition for Qwest’s mass market broadband services, do not serve many of the geographic areas in which businesses are located. An overly broad geographic market like the one Qwest apparently assumes would apply would therefore yield many unnecessary false negatives (findings of no market power where market power exists) or false positives (findings of market power where market power does not exist).

As is the case with similar petitions recently filed by BellSouth and Verizon, Qwest seems to hope that it can somehow fudge the definition of the mass market so that the relevant market will include the services demanded by small and medium enterprise (“SME”) customers over which ILECs continue to exercise market power.<sup>2</sup> In some places in the *Petition*, Qwest

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<sup>2</sup> Qwest’s petition follows petitions by Verizon and Bellsouth which use vague terminology in their request for forbearance coupled with evidence of competition from services that, in reality, only serve the mass market (*i.e.*, cable) to prove that *Computer Inquiry* and Title II regulations should be removed for RBOC services which serve

does refer only to consumer grade ADSL,<sup>3</sup> (*see, e.g., Petition* at 8), but in other places it implies that it seeks a broader definition of mass market services. For example, the vague reference to services demanded by some undefined class of small businesses combined with the proposal in the Strategic Policy Research paper, attached to the *Petition*, that the “mass market” should include any customer “*other than []*large business users (*viz.*, residential and small & medium-sized business customers)” (emphasis in original) reflect Qwest’s attempt to broaden the mass market for broadband services well beyond ADSL (and services that compete with ADSL).<sup>4</sup> Moreover, Qwest has advocated a similarly expansive definition of the mass market in other fora.<sup>5</sup>

As TWTC, Cbeyond and XO have explained elsewhere at length,<sup>6</sup> there are numerous reasons why requests for forbearance from common carrier regulation such as Qwest’s should be denied, especially for broadband services demanded by business customers. These comments incorporate those arguments by reference and focus instead on the critical question of the

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customers outside of the mass market. *See Petition of BellSouth Telecommunications Inc., for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Dkt. No. 04-405 (filed Oct. 27, 2004); *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Wavier with Regard to Broadband Services Provided via Fiber to the Premises*, WC Dkt. No. 04-242, (filed June 28, 2004); *Conditional Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*, WC Dkt. No. 04-242 (filed June 28, 2004). The Commission must again reject this flawed argument.

<sup>3</sup> *See Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, at 16 (2004) (“706 Report”) (“The DSL service primarily used by residential customers is asymmetric DSL . . .”).

<sup>4</sup> *See* John Haring & Harry M. Shooshan, *ILEC Non-Dominance in the Provision of Retail Broadband Services*, STRATEGIC POLICY RESEARCH, at 4 (Mar. 1, 2002) (“SPR Report”), attached as ex. 1 to *Petition*.

<sup>5</sup> *See* Qwest Comments, CC Dkt. No. 01-337, at 10 (filed Mar. 1, 2002) (asserting that there are only two relevant product markets for determining broadband market power, the mass market, and the “large business market”).

<sup>6</sup> *See* Comments of Time Warner Telecom, Cbeyond and XO, WC Dkt. No. 04-405 (filed Dec. 20, 2004) (“*Joint Comments on Bellsouth Petition*”); Reply Comments of Time Warner Telecom, WC Dkt. No. 04-242 (filed Aug. 2, 2004).

appropriate definition of the mass market for broadband services. The available market evidence demonstrates that the Commission must reject any attempt to include small or medium businesses within that market or within the scope of the *Petition* (which is expressly limited to the mass market). Small and medium business customers demand services such as DS-1s and HDSL for which mass market services such as ADSL and cable modem service are not substitutes. In addition, even if they were substitutes (which they are not), cable modem service is not even offered in many of the geographic areas in which small and medium business customers are located. As a result, incumbents continue to exercise substantial market power over DS-1 and HDSL services. For these reasons, as well as to advance the goal of efficient use of administrative resources, the Commission should define the broadband “mass market” as limited to services provided to residential and single line business customers.

## **II. DISCUSSION**

In the *Petition*, Qwest asks the Commission to forbear from applying dominant carrier tariff (*e.g.*, advanced notice requirements), rate averaging and avoided cost resale requirements applicable to what it refers to as its “mass market” xDSL service. This request covers much of the same ground as the recent BellSouth petition for forbearance since, as with the BellSouth Petition, it relies overwhelmingly on the market position of cable modem service and the absence of common carrier regulation for cable modem service as the basis for the requested relief. In fact, the only differences between the instant *Petition* and the BellSouth Petition are that (1) Qwest seeks forbearance from only the subset of common carrier regulations mentioned above whereas BellSouth seeks forbearance from all common carrier regulation, and (2) Qwest limits its forbearance request to mass market xDSL services whereas BellSouth seeks forbearance from regulation applicable to all broadband services. TWTC, Cbeyond and XO explained in their

joint comments in response to the BellSouth Petition that there is no basis for forbearing from common carrier regulation applicable to any incumbent LEC broadband service, especially those demanded by business customers. *See Joint Comments on Bellsouth Petition* at 3. Rather than repeat those arguments here, TWTC, Cbeyond and XO incorporate them by reference and focus instead on the critical question of how to define the mass market for broadband services.<sup>7</sup>

Section 10 of the Communications Act requires that the Commission forbear from a statutory or regulatory requirement only if it determines that (1) enforcement of the requirement is not necessary to ensure just, reasonable and not unreasonably discriminatory charges and practices; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is in the public interest. *See* 47 U.S.C. § 160(a). In assessing whether a petition is consistent with the public interest, the Commission must consider whether forbearance will promote competition. *See id.* at § 160(b). Where, as here, forbearance is sought from enforcement of economic regulation, the terms of Section 10 require, among other things, an analysis of whether competition in the relevant market has developed to a point at which regulation is no longer necessary.<sup>8</sup> That analysis in turn requires definition of the relevant product and geographic markets.<sup>9</sup>

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<sup>7</sup> It is important to emphasize that the Commission's recent (and incorrect) decision to forbear from Section 271 unbundling obligations for broadband network elements only increases the importance of retaining the bedrock common carrier regulations at issue here. *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (forbearing from applying Section 271 to broadband elements). As even Verizon has conceded, the forbearance analyses for unbundling and basic common carrier obligations are entirely separate, and granting forbearance from section 271 unbundling in no way supports granting forbearance from common carrier regulation. *See ex parte* presentation at 6, attached to Letter of Dee May, VP, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 02-33 *et al.*, (filed May 3, 2004). In fact, as Verizon has essentially conceded, once Section 271 unbundling has been eliminated, it is all the more critical that the Commission retain common carrier regulation, because the latter regulations are the only remaining constrain on ILEC anticompetitive behavior. *See id.*

<sup>8</sup> *See Petition of US West Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 31 (1999) ("competition is the most

Accordingly, Qwest's decision to limit its forbearance request to the mass market will likely cause the Commission to address the definition of that market in the instant proceeding. If the Commission undertakes such an analysis, it is critical that it do so in a manner that is faithful to the realities of the marketplace. Unfortunately, Qwest offers virtually no specifics as to the manner in which relevant product and geographic markets for mass market broadband should be defined. The scant information Qwest does offer regarding market definition seems to be designed to somehow convince the Commission both that (1) the mass market for broadband services includes consumer ADSL and cable modem services (normally demanded by residential and SOHO customers) *as well as* services demanded by SME customers, and (2) the relevant geographic market is the entire Qwest region (and apparently the entire country). These (largely implicit) proposals should be rejected.

As Qwest notes, the Commission defines relevant markets based on customer demand.<sup>10</sup> Market boundaries are delineated by identifying products that purchasers view as substitutes to which they will turn in response to a small but significant and nontransitory price increase for another product. Under this standard, the Commission has recognized that the services demanded by mass market, SME, and large business customers constitute three separate product markets: "the economic characteristics of the mass market, *small and medium enterprise*, and

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effective means of ensuring that. . . charges, practices, classifications, and regulations. . . are just and reasonable, and not unreasonably discriminatory.").

<sup>9</sup> See, e.g., *Comsat Corp., Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, ¶¶ 24-48 (1998).

<sup>10</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, ¶ 41 ("our new approach will rely exclusively on demand considerations to define the relevant product market, rather than supply substitutability."); *SPR Report* at 3 ("The economically relevant product market is the set of services perceived to be close substitutes for one another.").

large enterprise customer classes can be sufficiently different that they constitute major market segments . . . . These customer classes generally differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenues they generate, and the costs of delivering them services of the desired quality.”<sup>11</sup> (emphasis added). Accordingly, the Commission has *already decided* that broadband services such as integrated DS-1s (voice and data) and HDSL<sup>12</sup> demanded by SMEs<sup>13</sup> constitute a separate product market from the data services demanded by mass market customers<sup>14</sup> (dial-up, ADSL, and cable modem<sup>15</sup>) and large business customers (data products such as Frame Relay and ATM).<sup>16</sup>

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<sup>11</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, ¶ 123 (2003) (“*Triennial Review Order*”), *vacated in part, United States Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA IP*”), *cert. denied*, 125 S. Ct. 313 (2004).

<sup>12</sup> See HARRY NEWTON, *NEWTON’S TELECOM DICTIONARY* 323 (17<sup>th</sup> ed. 2001) (“HDSL allows the provisioning of T-1/E-1 local loop circuits much more quickly and at much lower cost than through conventional means.”).

<sup>13</sup> See Covad Comments, CC Dkt. No. 01-337 at 15 (filed Mar. 1, 2002) (“[S]mall and medium sized businesses utilize not just xDSL for broadband services, but also utilizes [sic] T-1 services, which are generally priced beyond the range of residential consumers. These business users also utilize different types of DSL service, such as SDSL and HDSL, whereas the mass market typically purchases ADSL or, in certain circumstances, dial-up services.”). The importance of symmetrical service to many small business users is underlined by Conversent, which notes that business customers are willing to pay 3 times more for Conversent’s symmetrical DSL service than Verizon’s ADSL offering. See Declaration of Robert J. Shanahan ¶ 17, attached as ex. 1 to *Conversent Reply Comments*.

<sup>14</sup> See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation; For Consent to Transfer Control of Licenses and Authorizations et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, n.552 (2004) (“The mass market consists of residential customers and very small business customers.”); *Triennial Review Order* ¶ 127 (“Mass market customers consist of residential customers and very small business customers. Mass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features. Some customers also purchase additional lines and/or high speed data services. Although the cost of serving each customer is low relative to the other customer classes, the low levels of revenue that customers tend to generate create tight profit margins in serving them. The tight profit margins, and the price sensitivity of these customers, force service providers to keep per customer costs at a minimum. Profits in serving these customers are very sensitive to administrative, marketing, advertising, and customer care costs. These customers usually resist signing term contracts.”).

<sup>15</sup> See *Triennial Review Order* ¶ 40 (noting that the cable companies’ hybrid-fiber coaxial networks have “historic[ally]” provided service to residential customers).

<sup>16</sup> See *id.* ¶ 129 (“Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality. The services they might purchase

Moreover, the Commission has recently held that the relevant geographic market for broadband loops is the wire center.<sup>17</sup>

Market realities demonstrate the appropriateness of these product and geographic market distinctions. Most importantly, SME customers that purchase integrated access and similar services demand higher levels of reliability than mass market customers that demand only ADSL or cable modem service.<sup>18</sup> SMEs often do not tolerate the perceived problems of service outages or quality of service of cable modem or ADSL service.<sup>19</sup> In addition, such customers often need more sophisticated technical capabilities, such as symmetrical, very high upstream transmission rates<sup>20</sup> and channelization to provide a combination of voice and data on the same high-capacity circuit.<sup>21</sup> Broadband services for SME customers must also be sufficiently secure to transmit

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include an internal voice and data network, local, long distance, and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing.”).

<sup>17</sup> See FCC News, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, FCC 04-290 at 2 (rel. Dec. 15, 2004) (announcing the adoption of impairment triggers for DS-1 and DS-3 loops that utilize a wire center geographic market). It should be emphasized that the wire center is in fact too large a geographic market. In the Triennial Review Remand proceeding, numerous competitors submitted voluminous information demonstrating that the appropriate geographic market definition was a customer location or, at most, a building. See, e.g., Letter of Heather Gold, SVP, Government Relations, XO, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 2 (filed Dec. 14, 2004) (“*Dec. 14 XO Letter*”) (explaining that only buildings that meet certain revenue thresholds justify loop construction); *ex parte* Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 4 (filed Dec. 1, 2004) (“*TWTC Dec. 1 ex parte*”).

<sup>18</sup> For example, as a part of its HDSL product, Covad offers a service level agreement with quality of service guarantees. Its ADSL product “TeleSoho Office DSL,” priced at a fraction of the cost, contains no such guarantees. See <http://www.covad.com/products/access/telespeed/comparisons.shtml>.

<sup>19</sup> In marketing its HDSL product, Verizon touts its reliability over ADSL. See [http://www.verizonmarketing.com/esg/products\\_dsl.asp?info=BE](http://www.verizonmarketing.com/esg/products_dsl.asp?info=BE) (“SHDHL . . . gives priority transmission to SHDSL data packets over ADSL when network congestion occurs.”).

<sup>20</sup> See Phillip Hunter, *Making More of Your Spectrum*, CABLE & SATELLITE INTERNATIONAL, at 19 (July-Aug. 2004) (“*Hunter*”) (“In many cases, business traffic is almost asymmetric in the upstream.”) (internal cites omitted).

<sup>21</sup> BellSouth has begun marketing a channelized T-1 product to compete with CLEC integrated offerings to “small businesses.” See Kevin Fitchard, *BellSouth Launches Integrated Access*, TELEPHONY, Jan. 12, 2004, available at [http://telephonyonline.com/ar/telecom\\_bellsouth\\_launches\\_integrated/](http://telephonyonline.com/ar/telecom_bellsouth_launches_integrated/).

financial and other competitively-sensitive data.<sup>22</sup> Mass market customers, by contrast, are not willing to pay the premium necessary for such services,<sup>23</sup> and generally only require the asymmetrical bandwidth provided by cable modem and ADSL service.<sup>24</sup> These widely divergent demand patterns demonstrate that services desired by SMEs are in a completely different product market from broadband services demanded by the mass market.<sup>25</sup>

As mentioned, in seeking forbearance from common carrier regulation of “mass market” broadband services, Qwest relies almost exclusively on the presence of competition from cable modem service. But the existing characteristics of cable modem service dictate that it cannot serve as a replacement for HDSL and DS-1 services demanded by SME customers. The limited upstream capacity<sup>26</sup> of current cable modem service offerings, Hybrid-Fiber Coax’s (HFC)

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<sup>22</sup> See *Understanding Broadband Demand: A Review of the Critical Issues*, Office of Technology Policy, U.S. Department of Commerce, (rel. Sept. 23, 2003), available at [http://www.technology.gov/reports/TechPolicy/p\\_Broadband\\_020921.htm](http://www.technology.gov/reports/TechPolicy/p_Broadband_020921.htm) (“More than 20% of companies surveyed by In-Stat/MDR indicated they would not chose any type of broadband for their main office location, while 70% of respondents said ‘security’ and ‘hosted applications’ were key influencers for their firm’s main office bandwidth requirements.”).

<sup>23</sup> See Michael Pastore, *Broadband Lacks a European Audience*, CLICKZNETWORK, Feb. 5, 2002, available at <http://www.clickz.com/stats/sectors/broadband/article.php/968611> (citing to a Gartner study showing that consumers are generally very price sensitive).

<sup>24</sup> See *706 Report* at 13 (“. . . most residential uses of the Internet require very asymmetric connections.”).

<sup>25</sup> Indeed, Verizon acknowledges this market split in its own promotional materials where it offers ADSL to customers with 7 or fewer business lines and HDSL and DS-1 services to customers with more than 7 business lines. See <http://www2.verizon.com/business/FYB/?ID=SMB>; [http://www.verizonmarketing.com/esg/home.asp?product=DATA^promo\\_id=998](http://www.verizonmarketing.com/esg/home.asp?product=DATA^promo_id=998). Such a statement would seem to contradict Verizon’s assertion that customers receiving 48 business lines or 2 full DS-1s should be considered in the mass market. See, e.g., *ex parte* Letter of William Barr, General Counsel, Verizon, to Michael Powell, Chairman, FCC, CC Dkt. No. 01-338 *et al.*, at 4 (filed Jan. 7, 2004). However, as discussed below, 7 business lines is still too high of a threshold for defining the mass market.

<sup>26</sup> See *Hunter* at 17 (noting that “[e]ven a relatively small business might require 10 telephone lines as part of a digital service package, requiring about 1 Mbps upstream (in total), and that is before data and video has been catered for. So it is easy to see that 200 Mbps would soon be consumed on a node that is serving multiple businesses as well as residential customers.”); Richard A. Chandler *et al.*, THE TECHNOLOGY AND ECONOMICS OF CROSS-PLATFORM COMPETITION IN LOCAL TELECOMMUNICATIONS MARKETS, HAI Consulting, at 35 (2002) (“Chandler”) attachment A to Comments of WorldCom, Inc., CC Dkt. Nos. 01-338 *et al.*, (filed Apr. 5, 2002).

shared architecture that can lead to customer concerns regarding service slowdowns and security problems,<sup>27</sup> and the absence of other features demanded by most business customers make cable modem service unsuitable for most SMEs.

Moreover, because HFC networks are shared, not only do businesses not receive service level agreements with Quality of Service (QoS) guarantees,<sup>28</sup> as many HDSL and DS-1 customers do, but Cox and Comcast place bandwidth limitations on their business users.<sup>29</sup> In addition, cable modem service generally does not include a voice capability except where the cable operator offers VoIP over its own facilities. All of these factors make cable modem service unattractive to most SMEs.

Importantly, even if cable modem service were in the same *product* market as HDSL and DS-1 services (which it is not), it is often not available in the *geographic* markets in which customers demand business class services. Broadband is not like breakfast cereal. A broadband end user connection cannot simply be shipped to the customer's location in response to price increases. As a result, if a customer has only one suitable broadband service connection, that customer will be subject to the exercise of market power. In the case of businesses, this is a significant problem. Even BellSouth admits that only 25 percent of businesses are currently

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Offering services similar to a symmetrical T-1 would "quickly exhaust the upstream capacity of even an upgraded cable network." *Chandler* at 36.

<sup>27</sup> See James Michael Steward, *Facing the security risks of cable modems*, TECHREPUBLIC, July 8, 2002, available at <http://insight.zdnet.co.uk/hardware/servers/0,39020445,2118716,00.htm>.

<sup>28</sup> PacketCable and DOCSIS cable modem standards cannot provide the same level of QoS as provided by HDSL service. See Covad Comments, WC Dkt. Nos. 04-313 *et al.*, at 23 (filed Oct. 4, 2004) ("*Covad Comments*").

<sup>29</sup> See <http://www.coxbusiness.com/AcceptableUsePolicy.pdf> at 1. Cox Business Services' "Acceptable Use Policies" indicates that the "Customer may not use the Services in a manner that places a disproportionate burden on the network or impairs the Service received by other Customers." *Id.* Similarly, Comcast notes in its "High-Speed Internet for Business Acceptable Use Policy," that "[y]ou must ensure that your activity . . . does not improperly restrict, inhibit, disrupt, degrade or impede any other user's use of the Service, nor represent (in the sole judgment of Comcast), an unusually large burden on the network." <http://work.comcast.net/legal/aup.asp>.

served by cable end user connections,<sup>30</sup> and only 60 percent are within “a few hundred feet” of a cable drop, (*id.*) (internal cites omitted), the likely outer-limit of any near-term cable network expansion. This reflects the reality that cable networks were built to serve residential customers and are not located in many of the areas in which small business customers are located. Qwest does not address this issue expressly in its *Petition*, but its broad request for relief seems based on the assumption that a national geographic market definition is appropriate. For the business market at least, the Commission has (as mentioned) rejected this approach in favor of relying on wire centers, and even that is a grossly over-broad geographic unit. In all events, a national market is completely inappropriate for analyzing ILEC market power in the provision of broadband services demanded by business customers.

The experience of Cbeyond, Conversent and NuVox confirm that, whether due to product or geographic market differences, cable modem service for “business” and ADSL on one hand and HDSL and DS-1 services provided via ILEC loops to small businesses on the other do not compete.<sup>31</sup> An important feature of the products that CLECs provide over DS1 circuits to many small businesses is the integration of voice and data over the same circuit. In addition to its other perceived shortcomings, cable modem service generally does not include a voice capability except, as noted previously, where the cable operator offers VoIP over its own facilities. For this reason as well, therefore, business customers usually do not perceive integrated DS1 products and cable modem service (or apparently any other cable offering) as substitutes. For example, few of Cbeyond’s small business customers port their numbers in from cable modem service

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<sup>30</sup> See *ex parte* Letter of Jonathan Banks, VP Executive and Federal Regulatory Affairs, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 5 (filed Nov. 8, 2004).

<sup>31</sup> As NuVox’s marketing VP notes: “NuVox offers services to meet the needs of small and medium-sized businesses that are not generally offered by cable companies in its markets.” Declaration of Christopher Benyo ¶ 2, attached to NuVox Comments, WC Dkt. Nos. 04-313 *et al.* (filed Oct. 4, 2004).

providers.<sup>32</sup> NuVox has asserted that, at most, 23 of its port-outs were to cable modem service providers.<sup>33</sup> Likewise, Conversent has experienced few ports to cable operators and, overall, sees little competition from cable modem providers.<sup>34</sup>

It is also important to note that the raw bandwidth advertised is often not indicative of the markets served by particular broadband offerings;<sup>35</sup> other service attributes can be equally or more important. For example, Cablevision's asymmetrical Business Class Optimum Online cable modem service sells for \$109.95 per month,<sup>36</sup> and it is advertised as providing bandwidth as high as 10 MB downstream and allegedly 1 MB upstream.<sup>37</sup> Qwest's ADSL product for "businesses" provides 1.5 MB downloads and 896k uploads at only \$38 per month.<sup>38</sup> At the same time, Cbeyond is able to generate an average of \$500 per month from its DS-1 "base-package," (with a total aggregate symmetrical bandwidth of only 1.544 MB) ordered by 88% of its customers.<sup>39</sup> Despite the relatively similar bandwidths, at least on paper, Cbeyond perceives

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<sup>32</sup> See *ex parte* Letter of Thomas Jones, Counsel, Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 4 (filed Nov. 19, 2004) ("*Cbeyond Nov. 19 Letter*").

<sup>33</sup> See *ex parte* Letter of Michael J. Pryor, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 4 (filed Nov. 22, 2004).

<sup>34</sup> See *ex parte* Letter of Scott Sawyer, VP Regulatory Affairs and Counsel, Conversent, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 1-2 (filed Dec. 1, 2004) ("*Conversent Dec. 1 Letter*").

<sup>35</sup> Indeed, Frame Relay service, which the Commission agrees is largely confined to the enterprise market (see *Triennial Review Order* ¶ 129) is often sold as a relatively narrowband data service. See AT&T Comments, CC Dkt. No. 01-337 at 20 (filed Mar. 1, 2002) ("At the outset, it is a misnomer to refer to these services as 'broadband' services. The most commonly used of these services is frame relay, yet about half of all frame relay ports are 56 or 64 Kbps ports -- i.e. on the 'narrowband' side of any conceivably defensible speed-based line.").

<sup>36</sup> See [http://www.optimum.com/index.jhtml?pageType=pricing\\_bcool](http://www.optimum.com/index.jhtml?pageType=pricing_bcool).

<sup>37</sup> See [http://www.optimum.com/business/index.jhtml?pageType=bcool\\_info](http://www.optimum.com/business/index.jhtml?pageType=bcool_info).

<sup>38</sup> See <http://pcat.qwest.com/pcat/productDetail.do?salesChannel=SmallBusiness&offerId=6460>.

<sup>39</sup> See *ex parte* presentation of Cbeyond at 3, attached to Letter of Patrick Donovan, Counsel, Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.* (filed Sept. 8, 2004) ("*Cbeyond Sept. 8 ex parte*").

little competition from cable providers, (*see Cbeyond Nov. 19 Letter* at 4), and is able to charge nearly 5 times as much for its service. Similarly, NuVox asserts that an average DS-1 generates between \$500 and \$700 per month in revenue.<sup>40</sup> If cable modem service or ADSL met the needs of Cbeyond and NuVox's SME customer base, these companies would be hemorrhaging customers and profits at these price differentials. Yet, Cbeyond is "currently EBITDA positive and is adding new customers every day," (*Cbeyond Nov. 19 Letter* at 5), while NuVox has been EBITDA positive since the second quarter of 2002.<sup>41</sup>

Importantly, competitors such as Cbeyond and NuVox that are competing for the SME market against the incumbents are completely dependant upon the ILECs' networks for their access and the ILECs retain market power over these facilities.<sup>42</sup> This is because, as TWTC, XO and other commenters have amply demonstrated, and as the Commission has confirmed, it is not cost effective to self-deploy the single DS-1s<sup>43</sup> or HDSL copper pair<sup>44</sup> needed to serve the SME market.

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<sup>40</sup> See NuVox Comments, WC Dkt. Nos. 04-313 *et al.*, at 3 (filed Oct. 4, 2004).

<sup>41</sup> See *ex parte* presentation of NuVox Communications at 3, attached to Letter of Michael J. Pryor, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.* (filed Dec. 7, 2004).

<sup>42</sup> See Reply Comments of NuVox WC Dkt. Nos. 04-313 *et al.*, at 3 (filed Oct. 19, 2004) ("[n]either NewSouth [which recently merged with Nuvox] nor Nuvox have deployed any of their own fiber."); *Covad Comments* at 25 ("ILEC legacy loops – including copper, hybrid and DS-1 loops – are needed to connect Covad to its customers."); *Cbeyond Sept. 8 ex parte* at 4 ("Cbeyond exclusively uses unbundled DS-1 loops and DS-1 level EELS to provide service to end user customers"); Reply Comments of Conversent, CC Dkt. No. 01-338 *et al.*, at 2 (filed July 17, 2002) ("*Conversent Reply Comments*") ("Conversent has found that it can efficiently provide voice and data service to [its small business customers] by leasing . . . unbundled local loops.").

<sup>43</sup> See, e.g., FCC News, FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, FCC 04-290 (rel. Dec. 15, 2004), Separate Statement of Commissioner Abernathy (noting that it is "uneconomic" for CLECs to deploy DS-1 loops in "the vast majority" of cases; *Dec. 14 XO Letter* at 2; *TWTC Dec. 1 ex parte* at 2-3; *ex parte* presentation of MiCRA *et al.*, WC Dkt. Nos. 04-313 *et al.*, at 5 (filed Oct. 18, 2004) (citing CLEC filings for the proposition that "KMC will not build laterals unless a customer purchases at least 3 DS3s . . . XO will not construct laterals unless combined customer demand in a building reaches at least 3 DS3s . . . Xpedius requires a bare minimum of 3 DS3s in customer demand before constructing laterals . . . For buildings over 500 feet from its fiber ring, ATI requires that a customer order OC-3 service before building . . . Echelon and

In light of this information, it is clear that the Commission was correct in concluding in the *Triennial Review Order* that the services demanded by SMEs belong in a separate product market from “mass market” broadband services and that SME customers are often not located in the same geographic markets in which mass market broadband is offered. The only remaining issue is how the Commission should specifically define the distinction between services demanded by mass market and SME customers. In addressing this question, it is critical to recognize that the Commission will never be able to delineate perfectly accurate market boundaries. As the D.C. Circuit recently recognized, market definitions need only be “sensible,” not perfect. *See USTA II*, 359 F.3d at 574. This is because the goal of accuracy must be balanced against the need to limit the costs of administering a particular regulatory regime. *See id.* at 575. As a result, the key is for the Commission to adopt a market definition that minimizes “false positives and false negatives.” *Id.*

In light of these considerations, the most appropriate definition of the mass market is services provided to residential and single line business customers. This is the best approach to the market definition question for at least three basic reasons. *First*, this approach comports with the available market evidence. To begin with, there is evidence that cable modem service often does not offer a viable alternative for even the smallest business customers. For example, Conversent has explained that many of its customers have only one business line using DS-1

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SNiPLink report that it is never economic to self deploy loops to their bases of DS-1 service customers.”) (internal citations omitted).

<sup>44</sup> *See Triennial Review Order* ¶ 299 (“Given the steep economic barriers associated with alternative loop deployment that are compounded by various identified operational issues, we require that loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over them. For these reasons, we also direct incumbent LECs to unbundle stand-alone copper loops and subloops for the provision of broadband service.”).

level solutions,<sup>45</sup> and yet Conversent has not encountered cable modem service as a competitor to any significant degree. *See id.* In addition, most of Cbeyond's SME customers do not order more than 5 business lines, and, as explained above, Cbeyond, has not encountered significant competition from cable modem service. Moreover, BellSouth's own integrated DS-1 product designed to compete with NuVox, Cbeyond, Conversent, XO, TWTC and others for the SME market is, according to BellSouth, designed for SMEs with as few as six lines.<sup>46</sup> This evidence alone would support defining the mass market as including residential customers and business customers with only a very small number of business lines. When combined with the fact that cable drops do not even connect to the vast majority of business locations and are not close to fully 40 percent of businesses, it is clear that it is appropriate to include only an extremely limited number of business customers in the mass market. Certainly defining the set to include only businesses with a single business line is fully justified in light of this evidence. Indeed, this is the only approach that might permit the use of a national geographic market. Inclusion of more business customers in the mass market would, among other things, require the use of a much more granular geographic market.

*Second*, a single business line delineation for the mass market would impose very few administrative costs. The ILECs already must compile information regarding which businesses subscribe to a single line vs. multiple business lines in order to levy the correct EUCL charge.<sup>47</sup> Therefore, it would be easy for the Commission to determine which customers should be considered within the mass market.

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<sup>45</sup> *See, e.g., Conversent Dec. 1 Letter* at 1 (“... many Conversent customers have only a single business line.”).

<sup>46</sup> *See* <http://contact.bellsouth.com/smallbusiness/products/data/bis/index.asp>.

<sup>47</sup> *See* 47 C.F.R. § 69.152(d)(1) (“Beginning July 1, 2000, in a study area that does not have deaveraged End User Common Line Charges, the maximum monthly charge for each primary residential or *single-line business* local exchange service subscriber line shall be the lesser of . . . .”) (emphasis added).

*Third*, this approach is consistent with the Commission’s decisions in the unbundling context. In that context, the Commission has consistently focused on residential customers as the prototypical mass market customers. For example, in justifying its adoption of unbundling exemptions for mass market customers, the Commission has repeatedly relied on the existence of cable modem competition as justification for that relief.<sup>48</sup> At the same time, as mentioned, the Commission recognized that cable modem service is a predominantly residential offering.<sup>49</sup> More recently, the Commission has limited the application of the unbundling exemption for fiber-to-the-premises facilities serving multi-dwelling units to those buildings that are “predominantly residential.”<sup>50</sup>

Accordingly, if the Commission must address the question of how to define the mass market for broadband services, it should limit that market to residential customers and single line businesses. No other approach is as fully supported by the available market evidence, as effectively advances the goal of administrative efficiency and as consistent with the Commission’s prior decisions.

### III. CONCLUSION

The Commission should deny Qwest’s insofar as it requests forbearance from regulations for products that serve customers outside of the mass market. Moreover the Commission should

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<sup>48</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, n.45 (“The decision to grant additional unbundling relief for FTTC loops also is supported by our analysis of the state of intermodal competition. Cable companies have widely deployed broadband service . . . .”); *Triennial Review Order* ¶ 276 (noting that unbundling is not necessary because FTTH will be competing with cable modem service).

<sup>49</sup> See *Triennial Review Order* ¶ 52 (“The cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints, and bundling telephone service with cable modem services.”); *id.* ¶ 263 (agreeing with Allegiance that intermodal competition from cable, where it exists at all, primarily effects the unbundling analysis for the residential, mass market).

<sup>50</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, ¶ 4 (2004).

define the mass market as residential customers and those business customers with one business access line or less.

Respectfully submitted,

                  /s/ Thomas Jones                  

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